U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: 08/12/99
Case No. 1999 INA 0078

In the Matter of:

ROSARIO CALABRETTA CONSTRUCTION, Employer

on behalf of

EDDY MARTIN BALLADARES-MARTINEZ, Alien

Appearance: Christina Aborlleile, Esq., Philadelphia, Pennsylvania, for Employer and Alien.
Certifying Officer: R. E. Panati, Region III.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of EDDY MARTIN BALLADARES-MARTINEZ ("Alien") by ROSARIO CALABRETTA CONSTRUCTION ("Employer") under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U. S. C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, Employer requested review pursuant to 20 CFR § 656.26.[1]

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On November 14, 1997, the Employer, which is in business as a "General Contractor," applied for certification for the Alien to fill the position of "Building Maintenance Repairer." The position was classified under DOT Occupation No. 899.381-010, Maintenance, Repairer, Building.[3] The Employer described the Job as follows:

> Maintain structure of apartment building; paint and repair plaster, woodwork, floors and stairs; repair and fix plumbing fixtures and electrical equipment. Must have positive references.

AF 13. Although no educational qualification or training was stated, the Employer required two years' experience in the Job Offered. *Id.*, box 14. The job required a forty hour work week, based on a work schedule from 7:00 a.m. to 3:00 P.M., for which Employer offered a wage at $15.58 per hour with no provision for overtime work. *Id.*, boxes 10-12.[4] Although five U. S. workers applied in response to Employer's recruitment effort, it did not hire any of them. AF 17-25.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]899.381-010 **MAINTENANCE REPAIRER, BUILDING** (any industry) alternate titles: building repairer. Repairs and maintains physical structures of commercial and industrial establishments, such as factories, office buildings, apartment houses, and logging and mining constructions, using handtools and power tools: Replaces defective electrical switches and other fixtures. Paints structures, and repairs woodwork with carpenter's tools. Repairs plumbing fixtures. Repairs plaster and lays brick. Builds sheds and other outbuildings. *GOE: 05.10.01 STRENGTH: M GED: R4 M3 L3 SVP: 7 DLU: 81.*

[4]A National of Nicaragua, the Alien was living and working in the United States without a visa or any other lawful authority at the time of application. Born in 1975, the Alien's Statement of Qualifications indicated that he graduated high school in Nicaragua in 1993. He said he worked forty hours a week in building maintenance for a general contractor from August 1992 to August 1994 while attending high schools in Nicaragua. From December 1995 to the date of application he worked for the Employer in the Job Offered. AF 16.

Notice of Findings. Subject to rebuttal, the CO denied certification in the Notice of Findings ("NOF") issued on August 12, 1998. AF 10-11. Observing that 20 CFR §§ 656.20(c)(8) and 656.21(b)(6) applied to this case, the NOF said these regulations apply not only to an employer's formal rejection of an applicant, but also to a rejection that occurs because of actions taken by the employer. The Employer reported telephone calls to U. S. workers Olender, Migliaccio, Peay, and McAllister in order to schedule them for interviews. The Employer reported that the calls were unsuccessful, and that no certified mail or other attempt was made to contact these applicants. The NOF commented that

> An employer who does no more than place unanswered phone calls and has not followed such attempt with a certified letter has failed to make the minimally acceptable effort.

AF 11. Adding that the Employer had the burden of proof to show that these workers were not able, willing, qualified and available for the position, the NOF said its failure to provide lawful, job-related reasons for rejecting the U. S. workers at the time of their initial referral violated the regulations cited..

Rebuttal. The Employer's rebuttal of September 15, 1998, consisted of a letter from counsel and a letter from the employer's owner discussing the deficiencies described in the NOF. The attorney and the owner argued that he had telephoned applicants Olender, Migliaccio, Peay, and McAllister more than once, had left messages each time, and had no responses. In the case of Mr. Olender, he spoke with the worker's wife in one message.
Although he had no response to any of his calls, he did not write a letter to any of these job applicants, but did not think that good faith recruiting should require him to do so because this was not what he normally would have done in the ordinary course of his business. AF 08-09.

Final Determination. On September 25, 1998, the CO denied certification in a Final Determination, which rejected the Employer's rebuttal as insufficient to sustain its burden of proof that the U. S. workers were not able willing, qualified, or available for the Job Offered.
AF 05-06, again citing 20 CFR §§ 656.20(c)(8) and 656.21(b)(6) and restating the discussion set out in the NOF, as *supra*. The CO rejected Employer's rebuttal that it was not common for an employer in his business to follow up with correspondence when an applicant failed to respond to a telephone message. The CO continued,

> An employer applying for a labor certification has the burden of proving that U. S. workers failed to respond to advertising efforts and were consequently unavailable for the position. The Employer's duty to test the labor market cannot depend on an employer's established system of recruitment. While this may suffice for routine recruitment, it is inadequate for purposes of obtaining labor certifications. A phone call is insufficient largely because it cannot be documented. Mere assertions of unavailability following recruitment activity are insufficient without supporting documentation. The application remains in violation of Federal regulations and certification is denied accordingly.

AF 06.

Appeal. On October 28, 1998, the Employer requested administrative-judicial review by BALCA. AF 01-04. Its owner argued that the multiple telephone calls he alleged were a "minimally acceptable effort," and that, based on their resumes, the named U. S. applicants were not qualified for the job.

Discussion

Burden of proof. In all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification. The imposition of the burden of proof in this case is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[5] Consequently, the Panel must strictly construe this exception, and must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Analysis and conclusion. 20 CFR § 656.21(b)(6) provides that, if U. S. workers applied for the job and were not hired, the employer is required to prove that they were rejected solely for reasons that were lawful and job related. 20 CFR § 656.21(c)(8) states that the job opportunity must be shown to be open to any qualified U. S. worker.

Applicants' qualifications. The Employer's appeal belatedly asserted, however, that the U. S. workers were not qualified for this job. 20 CFR § 656.25(e) requires employer's rebuttal evidence to address all of the NOF findings, as any findings that were not rebutted are deemed admitted. **Belha Corp.**, 88 INA 024 (May 5, 1989)(*en banc*). Although the NOF required Employer to show that the apparently qualified U. S. workers it named were not able, willing, qualified or available for this job opportunity, the Employer's rebuttal said nothing about the qualifications of the workers that the NOF had named. Consequently the workers' qualifications for the job were deemed admitted. AF 08-09, 11. Moreover, 20 CFR § 656.26(b)(4) limits the issues and evidence before BALCA by providing that,

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[5] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

> The request for review, statements, briefs, and other submissions of the parties and *amicus curiae* shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.

As the issue of the applicants' qualifications was not before the CO at the time of the Final Determination, it was not a legal argument or issue on which the denial of labor certification was based. Consequently, in addition to admitting that the job applicants were qualified by omitting a challenge to the qualifications of the U. S. job candidates from its rebuttal, the Employer's failure to raise this issue before the CO issued the Final Determination precluded its argument concerning their qualifications from becoming an issue in this appeal. **Denihan Co.**, 90 INA 432 (Feb. 11, 1992).[6]

Alternative means of contact. While the Employer may follow any policy or procedure it may fancy in the recruitment of workers for its business, it is required to comply with the Act and regulations when it engages in the recruiting U.S. job seekers in the process of testing the labor market pursuant to an application for alien labor certification. The Employer in this case telephoned but never reached four of the U. S. workers who applied for the position. Employer's owner was unwilling to proceed beyond making telephone calls to those job applicants because this was contrary to his personal policy and was inconsistent with what he regarded as the normal behavior of businesses engaged in the hiring process.

There is an implicit requirement that employers engage in a good faith effort to recruit qualified U. S. workers. **Creative Cabinet and Store Fixture**, 89 INA 181(Jan 24, 1990)(*en banc*); **H. C. LaMarche Ent. Inc.**, 87 INA 607 (Oct. 27, 1988)(*en banc*). Also see **Daniel Costiuc**, 94 INA 541 (Feb. 23, 1996). It is well established that in order to prove good-faith recruitment an employer has an obligation to try alternative means of contact when initial means are unsuccessful. **Yaron Development Co., Inc.**, 98 INA 178 (Apr.19, 1991)(*en banc*).[7] An employer's unsuccessful attempts at telephone contact, without more, are not sufficient to establish a good faith effort to recruit where the employer made only unanswered phone calls and no letters were mailed. **Gilliar Pharmacy,** 92 INA 003 (Jun. 30, 1993). The result was similar in **Allcity Auto Repairs**, 91 INA 008 (Mar. 24, 1993), where the Employer's attempts at

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[6] An applicant usually is considered qualified for a job, if he meets the minimum requirement specified for the position in the labor certification application. **United Parcel Service**, 90 INA 090 (Mar. 28, 1991); **Mancillas International Ltd.**, 88 INA 321 (Feb. 7, 1990); **Microbilt Corp.**, 87 INA 635 (Jan. 12, 1988). An employer's rejection was held to be unlawful where the U. S. worker satisfied the minimum requirements specified on the Form ETA 750A and in the advertisement for the position. **Banque Francaise du Commerce Exterieur**, 93-INA-44(Dec. 7, 1993); **American Cafe**, 90 INA 026 (Jan. 24, 1991); **Cal-Tex Management Services**, 88 INA 492 (Sept. 19, 1990); **Richco Management**, 88 INA 509 (Nov. 21, 1989).

[7] See also **L.G. Manufacturing, Inc.**, 90 INA 586 (Feb. 5, 1992); and see **Ceylion Shipping, Inc.**, 92 INA 322 (Aug. 30, 1993); **Roma Ornamental Iron Works, Inc.**, 92 INA 394 (Aug. 26, 1993); **Delmonico Hotel Co.**, 92 INA 324 (Jul. 20, 1993).

telephone contact were not sufficient because the employer's phone calls were unanswered, and it only left a message that was not answered. Where attempts to reach an applicant by telephone are not successful, BALCA has held that a reasonable effort requires an alternative method of contact, such as mail. **Delmonico Hotel Co.**, 92 INA 324 (Jul. 20, 1993); **Phototypes, Inc.**, 90 INA 063 (May 22, 1991).

As the Employer's duty to investigate qualifications of job applicant required that it contact and interview the job candidates, its expressed uncertainty as to their qualifications suggests that in this case common sense would have impelled the Employer to follow up its unsuccessful telephone calls to determine whether any of these workers could fill the job. **Gorchev & Gorchev Graphic Design**, 89 INA 118 (Nov. 29, 1990)(*en banc*). As the Employer did nothing but telephone again after its initial calls failed, its recruitment efforts cannot be regarded as sufficient or *bona fide*. It follows that sufficient evidence supported the CO's denial of certification, as Employer failed to demonstrate the unavailability of U. S. workers who are qualified and willing to accept the Job Offered. **Entron Enterprises, Inc.**, 89 INA 132 (Feb. 27, 1990).

Summary. The Panel concludes that the NOF provided adequate notice of the reasons for the denial of certification, that the Employer was told how to cure the defects found in the application, and that its rebuttal failed to sustain the burden of proof. As the greater weight of the credible evidence supported the CO's denial of alien labor certification, the following order will enter.

ORDER

The denial of alien labor certification by Certifying Officer is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 1999 INA 0078
ROSARIO CALABRETTA CONSTRUCTION, Employer
EDDY MARTIN BALLADARES-MARTINEZ, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Huddleston			
Jarvis			

Thank you,

Judge Neusner

Date: May 24, 1999